U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWRENCE M. DAIGNEAULT and U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Albany, NY

Docket No. 98-885; Submitted on the Record;
Issued November 17, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and did not demonstrate clear evidence of error.

On February 15, 1990 appellant, then a 42-year-old mailhandler, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he injured his back as a result of his employment. Specifically, appellant alleged that the first time he hurt his back was in 1985 when he was unloading trucks, that this injury was treated and that he never had back problems again until August 26, 1989.[1]

The record reveals that on December 3, 1990, the Office accepted appellant's claim for aggravation of discogenic disease.

On October 15, 1993 appellant filed a notice of recurrence of disability and claim for continuation of pay/compensation (Form CA-2a) alleging that he sustained a recurrence commencing March 17, 1993. The employing establishment controverted the claim, alleging that appellant had degenerative disease in the cervical and lumbar spine unrelated to the work injury.[2]

By decision dated April 14, 1994, the Office rejected appellant's claim because the evidence failed to establish that the claimed medical condition or disability was causally related to the injury. Specifically, the Office found that the medical evidence currently in the case

[1] Later, appellant amended this date to July 26, 1989.

[2] The record reveals that appellant's last day in a work status was August 8, 1992; that he resigned effective November 10, 1992; and that on March 17, 1993, appellant's application for disability was approved by the Federal Employees' Retirement System.

record failed to demonstrate that the claimed recurrence of disability was causally related to the employment injury.

By letter dated May 4, 1994, received by the Office on May 13, 1994, appellant, through his attorney, requested an oral hearing before an Office hearing representative and submitted additional evidence in support thereof.

By decision dated July 30, 1995, finalized August 2, 1995, the Office hearing representative affirmed the Office's April 14, 1994 decision that appellant had not established that his back condition or disability commencing March 17, 1993 was causally related to his accepted work-related injury.

By letter dated May 29, 1996, but not received by the Office until November 27, 1996, appellant, through his attorney, requested reconsideration of the Office hearing representative's decision.

By letter dated November 19, 1996, appellant's attorney asked the Office whether in the interest of justice appellant's request for reconsideration should be considered as appellant made good faith efforts to obtain medical evidence prior to the deadline for submitting applications for review.

By facsimile dated September 24, 1996, the medical record department assistant manager for the community health plan through which appellant received treatment from a Dr. Patel, stated that appellant was very proactive in attempting to get the medical information and the medical records department acted in an inefficient manner. Enclosed with the fax was an unsigned report by Dr. Patel of a September 25, 1996 visit with appellant, in which he noted that appellant had "extensive cervical and lumbar spondylosis with dis[c] degeneration." Dr. Patel further opined that appellant's condition was occasionally related to the type of work he did in his past; he specifically noted that "activities like bending and lifting would aggravate his symptoms." Dr. Patel noted that appellant could return to light duty.

By decision dated January 24, 1997, the Office denied appellant's application for review as it was not filed within the one-year regulatory period required and the evidence submitted in support of the application was insufficient to warrant the Office reopening the claim under its "discretionary authority granted by [s]ection 8128(a)."

The Board finds that the Office properly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a) on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2), and that the application failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's January 24, 1997 decision denying appellant's request for a review on the merits of the decision of its Office hearing representative dated July 30, 1995, finalized August 2, 1995. Because more than one year has elapsed between the issuance of the Office hearing representative's decision and January 14, 1998, the date appellant filed his appeal with the Board, the Board lacks jurisdiction

to review the decision of the hearing representative dated July 30, 1995, finalized August 2, 1995.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may --
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> (1) end, decrease, or increase the compensation previously awarded; or
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> (2) award compensation previously refused or discontinued."

The Office, through regulations, has imposed limitations on the exercise of its discretion authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that "the Office will not review … a decision denying or terminating a benefit unless that application is filed within one year of the date of that decision." The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[3]

In the present case, the most recent merit decision on the issue of whether appellant had a recurrence of disability on March 17, 1993 is that of the Office hearing representative dated July 30, 1995 and finalized August 2, 1995. Appellant had one year from the date of this decision to request reconsideration and did not do so until November 27, 1996.[4] The Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[5]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[6] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error. Evidence which does not

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[3] *Mamie L. Morgan*, 47 ECAB 281 (1996).

[4] Appellant's request for reconsideration was received by the Office on November 27, 1996. Two letters from appellant's attorneys accompanied the request. These letters are dated May 29 and November 19, 1996, but were also first received by the Office on November 27, 1996.

[5] *John Fettig*, 47 ECAB 277, 280 (1996).

[6] *Jeanette Butler*, 47 ECAB 128, 131 (1995).

raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[7] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office. To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the medical opinions or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[8]

The Office properly found that appellant did not produce evidence sufficient to show clear evidence of error. In fact, the only new evidence produced on reconsideration was a report from Dr. Patel describing a September 24, 1996 visit. In this report, he reiterated his previous diagnosis of extensive cervical and lumbar spondylosis with disc degeneration. Dr. Patel opined that appellant had partial disability, which would become permanent. He also noted that appellant remained capable of performing a light-duty job. Nothing in this report evidences a work-related aggravation, or sets forth any reason that this alleged recurrence of disability occurred on March 17, 1993. In this regard, although Dr. Patel reported that appellant's current symptoms "occasionally related to the type of work he did in the past" and that bending and lifting "would aggravate his symptoms," he did not explain why the work activities were so debilitating thereby rendering him disabled for regular work. Moreover, the fact that work activities may produce symptoms revelatory of an underlying condition does not raise an inference of employment relation.[9] Additionally, Dr. Patel noted that appellant retired on disability in 1992. He does not explain how appellant's work activities in the past affect his underlying condition on the date of the office visit. The Board also notes that Dr. Patel's report is devoid of his signature. As the Board has held, any medical evidence which the Office relies upon to resolve an issue must be signed by a qualified physician.[10] As Dr. Patel's report has not raised a substantial question as to the correctness of the Office hearing representative's decision, it fails to show clear evidence of error.[11]

[7] *Id.*

[8] *Id.*

[9] *Primo T. Salta*, 34 ECAB 1033 (1983).

[10] *See James A. Long*, 40 ECAB 538 (1989).

[11] *See Howard A. Williams*, 45 ECAB 853, 859 (1994).

The decision of the Office of Workers' Compensation Programs dated January 24, 1997 is affirmed.

Dated, Washington, D.C.
November 17, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member